

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

FILE: WAC 03 047 54069 Office: CALIFORNIA SERVICE CENTER Date: DEC 30 2004

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is in the retail trade business. It seeks to employ the beneficiary permanently in the United States as a custom tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based-immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on March 1, 2001. The proffered salary as stated on the labor certification is \$29,848 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 and 2001 Forms 1040, U.S. Individual Income Tax Returns. The returns reflected an adjusted gross income of \$43,477 and \$56,993, respectively. This documentation was considered insufficient by the director, and, on May 2, 2003, the director requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage to be in the form of copies of annual reports, completed and signed federal tax returns, or audited financial statements from 2002 to the present.

In response, counsel submitted copies of the petitioner's 2000 through 2002 Forms 1040, U.S. Individual Income Tax Returns. The 2002 tax return reflected an adjusted gross income of \$39,960.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on July 26, 2003, denied the petition.

On appeal, the petitioner, through counsel, submits copies of its Schedule C, Profit or Loss From Business, for the tax years 2001 and 2002, copies of bank statements for 2001, 2002 and January through June of 2003, a letter from the petitioning owner's parents, and copies of the parents 2001 and 2002 Forms 1040, U.S. Individual Income Tax Returns. Counsel states:

First, as you know, the employer's business structure may [be] considered when establishing the ability to pay the offered wage. When the employer is a sole proprietorship or a general partnership, the assets of the sole proprietor or general partners may be taken into account when evaluating the employer's financial situation. In this case, the petitioner is a sole proprietorship and has [sic] does have other assets. As stated in the petitioner's support letter, schedule "C" of the tax returns state year-end inventory for 2001 was \$260,065.00 and for 2002 was \$250,190.00. This year-end inventory is Michael's Uniform's liquid assets. As BCIS has accepted other types of proof in the past, especially of a small employer's ability to pay the offered wage, the petitioner requests that BCIS accept the petitioner's liquid assets as proof of the employer's ability to pay the offered wage. See *Matter of Quintero-Martinez*, Case No. A29 928 323 (AAU Aug. 4, 1992), as discussed in 70 Interpreter Releases 252-53 (Mar. 1, 1993) and *Oriental Pearl Restaurant*, 92-INA-59 (BALCA Aug 24, 1993) (Region IV).

Second, the employer has maintained sufficient cash balances in his personal bank accounts to be able to pay the alien's salary. In the attached supporting letter, the employer states that he does not rely on his business' income for his personal income and he has continuously maintained more than sufficient cash balances to be able to pay the prevailing wage salary for [REDACTED]. For March 2001 through December 2001, the average checking account balance was \$5,668.000 and the average regular savings account never fell below \$11,000.00. For January 2002 through December 2002, the average checking account balance was \$11,460.00 and the regular savings never fell below \$11,000.00 (except for December 2002 – when the employer transferred the regular savings balance to his Interest Maximizer Account). For January 2003 through July 2003, the average checking balance was \$8,041.00. In his Interest Maximizer Account, his balance is in excess of \$90,000.00.

Additionally, the BCIS must also consider other sources of income pledged to employer. [REDACTED] 730 F.Supp. 441, 449 (D.D.C. 1988). Specifically, in the employer's support letter, the employer's parents state that they contribute to his personal expenses. (Please see exhibit C in the employer's support letter.

Third, since the alien is not already employed by the employer, please note that the employer has stated that he will achieve savings once the alien's employment begins and thereby improve its financial condition and obtain more profits once the alien's

employment begins. As stated in the employer's support letter, the business currently depends on outsourcing our tailor work. By hiring Mr. Saleh, the business expenses will decrease because higher wages for tailors outside of the business will no longer be necessary. Additionally excess inventory will decrease due to a full time tailor who will be able to meet the needs of customers and clientele. Therefore a full time tailor will decrease expenses and increase business profits.

Fourth, as the employer support letter states, the business has over thirteen (13) years of successful operation as proof of their track record. The petitioner mentions that the slow down of the economy has had some effect on their business, but he believes this is only temporary and that a full time tailor that will improve the employer's position in the future. See *Matter of Sonecawa [sic]*, 12 I&N Dec. 612.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not provide evidence that it employed the beneficiary from 2001 to the present or that the beneficiary was compensated at a salary equal to or greater than the proffered wage in those years.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

The 2001 and 2002 tax returns reflect adjusted gross incomes of \$56,993 and \$39,960, respectively.

The petitioner is a sole proprietorship. The petitioner's owner is obliged to pay the petitioner's debts and obligations from his own income and assets. The petitioner's owner is also obliged to show that it was able to pay the proffered wage out of his adjusted gross income, the amount left after all appropriate deductions. Furthermore, he is obliged to show that the amount remaining after the proffered wage is subtracted from his adjusted gross income is sufficient to support his family, or that he has other resources and need not rely upon that income. The amount remaining after the petitioner paid the proffered wage would be \$27,145 in 2001

and \$10,112 in 2002. Since the director failed to request evidence of the petitioner's monthly expenses, it is impossible for the AAO to determine if the remaining amounts are sufficient to pay the petitioner's monthly household expenses. However, it is noted that the petitioner possessed a checking account that ranged in balances of \$1,156.86 to \$24,097.12, a savings account with a balance of over \$11,000 each month, and a maximizer account of over \$91,000, apparently more than enough to pay the proffered wage.

It is noted that counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441, 449 (D.D.C. 1988), however, the decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the proffered wages. Here, counsel is asserting that CIS should treat the letter of the petitioning owner's parent, as evidence of the petitioner's ability to pay, even though the parents are not obligated by law to pay the debts of the petitioner and there was no evidence provided that the parents actually paid the petitioning owner's household expenses.

Counsel also claims that the petitioner's year-end inventory are liquid assets and that it be considered as proof of the petitioner's ability to pay the proffered wage. Counsel has not, however, explained how inventory can be considered liquid assets nor cited any precedent decisions that would allow such a consideration. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. See 8 C.F.R. § 103.9(a).

Counsel notes that CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition that had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a

former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present case, the petitioner has been in business for thirteen years and has been outsourcing some of its tailoring jobs. Its gross receipts have ranged from approximately \$700,000 to \$900,000 and its profits have remained steady. In addition, the petitioner's tax returns reflect an adjusted gross income consistently higher than the proffered wage of \$29,848 for each of the years, 2000 through 2002. In summary, it has been determined that the petitioner has established its ability to pay the proffered wage through its checking, savings, and maximizer accounts and through its overall business activities.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.